

2007

# Bentley Wilson v. Brenda Wilson : Brief of Appellee

Utah Court of Appeals

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Rosemond Blakelock; Attorney for Appellant/ Petitioner.

Scott P. Card; Fillmore Spencer LLC; Attorneys for Respondent/Appellee.

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**IN THE UTAH COURT OF APPEALS**

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BENTLEY WILSON,

Petitioner/Appellant,

vs.

BRENDA WILSON,

Respondent/Appellee.

Case No. 20070359-CA

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**BRIEF OF APPELLEE**

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APPEAL FROM FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY,  
STATE OF UTAH, FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
JUDGMENT, DATED MARCH 27, 2007, DENYING RELIEF TO PETITIONER,  
BEFORE THE HONORABLE GARY D. STOTT

---

**ROSEMOND BLAKELOCK (4241)**

75 South 300 West

Provo, Utah 84601

Counsel for Appellant/Petitioner

**SCOTT P. CARD (6847)**

**AARON P. DODD (10239)**

Fillmore Spencer, LLC

3301 N. University Ave.

Provo Utah, 84604

Telephone: (801) 426-8200

Counsel for Appellee/Respondent

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**ROSEMOND BLAKELOCK (4241)**

75 South 300 West

Provo, Utah 84601

Counsel for Appellant/Petitioner

**SCOTT P. CARD (6847)**

**AARON P. DODD (10239)**

Fillmore Spencer, LLC

3301 N. University Ave.

Provo Utah, 84604

Telephone: (801) 426-8200

Counsel for Appellee/Respondent

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Respondent/Appellee.

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**BRIEF OF APPELLANT**

\* \* \* \*

**STATEMENT OF JURISDICTION**

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(h).

**ISSUES PRESENTED AND STANDARDS OF REVIEW**

Whether the trial court correctly found that the temporary orders relating to child support and alimony were adopted by the divorce decree and that Petitioner owes Respondent \$107,066.00 for past child support and alimony obligations as of September 2006? “[O]rders distributing property and setting alimony will not lightly be disturbed” and are reviewed “under an abuse of discretion.” *Olsen v. Olsen*, 2007 UT App 296, ¶ 9, 169 P.3d 765. This Court reviews a trial court’s legal conclusions for correctness. *State v. Houston*, 2006 UT App 437, ¶4, 147 P.3d 543.

## **CONTROLLING STATUTORY PROVISIONS**

Any controlling statutory provisions and rules are set forth in the Addenda.

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case**

Bentley Wilson appeals from the March 27, 2007 order from the trial court, entitled FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT, wherein Brenda Wilson was awarded \$107,066.00 in past alimony and child support (R. 799-804).

#### **B. Trial Court Proceedings and Disposition**

Bentley Wilson (“Petitioner”) filed for divorce on December 19, 2003 (R. 13-20). On June 24, 2004, the parties filed a Stipulation of Temporary Support, wherein Petitioner agreed that he earned approximately \$10,000 per month and Brenda Wilson (“Respondent”) agreed that she was not employed (R. 55-57). The parties agreed that Petitioner shall pay child support in the amount of \$700 per month per child during the pendency of this action and alimony in the amount of \$4,000 per month during the pendency of this action (R. 56).

An Order of Temporary Support was signed by the court on August 10, 2004 and filed on August 11, 2004, wherein the Stipulation of Temporary Support was reduced to an Order, and Petitioner was ordered to pay child support and alimony in the same amounts as previously stipulated to (R. 98-101).

The Divorce Decree was entered on October 7, 2004 (R. 339). An Amended Decree of Divorce (“Amended Decree”) was entered on November 2, 2004 (R. 359-70).



Amended Findings of Fact and Conclusions of Law (“Amended Findings”) were also filed on November 2, 2004 (R. 347-58; *see also* Exhibit D, Addenda of Aplt. Br.).

Almost two years later, Respondent requested judgment on child support and alimony arrearages on August 25, 2006 (R. 556-67). Petitioner filed an Objection, asserting that the Temporary Orders for child support and alimony merged in the Decree and that Respondent was not entitled to a Judgment on child support and alimony arrearages, asserting that the Decree did not award Respondent child support or alimony (R. 600-05).

Commissioner Patton heard oral arguments regarding outstanding child support and alimony arrearages, and held that Respondent was entitled to all arrearages based on child support and alimony (R. 611-12; 660). Petitioner was given two weeks to provide proof of payment (R. 611; 659). The court found that Petitioner owed \$108,116.00 for child support and alimony arrearages through September 2006 (R. 559-60; 66; *see also* Exhibit E, Addenda of Aplt. Br.).

Petitioner filed an objection to the recommendation of the Commissioner on September 20, 2006 (R. 637-44). The trial court heard oral arguments on Petitioner’s Objection on January 2, 2007 (R. 686; 811). The court agreed with the Commissioner’s findings and legal conclusions, finding that the Amended Decree implicitly adopts the temporary support orders, wherein Petitioner was ordered to pay child support in the amount of \$700 per month per child and alimony in the amount of \$4,000 per month (R. 799-801; *see also* Exhibit F, Addenda of Aplt. Br.). The court, however, modified the Judgment by reducing the amount for the approximate month-and-a-half that the children

were in Petitioner's custody (R. 801). The court entered a Judgment in the amount of \$107,066.00 against Petitioner (R. 801).

Petitioner filed his notice of appeal on April 25, 2007 (R. 809).

### **STATEMENT OF RELEVANT FACTS**

The parties were married on July 30, 1984 (R. 19-20). The parties had four children together, three of whom were minors at the time of filing for divorce (R. 19-20).

After Petitioner filed for divorce on December 19, 2003, the parties filed a Stipulation of Temporary Support on June 24, 2004 (R. 13-20; 55-57). In the Stipulation, Petitioner agreed that he earned approximately \$10,000 per month and Respondent agreed that she was not employed (R. 55-57). Moreover, the parties agreed that Petitioner was to pay child support in the amount of \$2,100 per month and alimony in the amount of \$4,000 per month (R. 56).

The Stipulation was reduced to an order and the Order of Temporary Support was filed on August 11, 2004. (R. 98-101). The Petitioner was ordered to pay child support and alimony as stipulated to (R. 98-101).

Almost two months later, the Divorce Decree was entered on October 7, 2004, and an Amended Decree of Divorce was entered on November 2, 2004 (R. 339; 359-70). The Amended Decree states that the parties reached a stipulation on the record at a hearing held on September 27, 2004 before Commissioner Patton (R. 370). The stipulation related to custody issues, child support, alimony, and expenses related to the children (R. 361-70). All other issues were reserved (R. 361). The parties stipulated to joint legal custody of the three minor children, with Respondent being designated as having primary

physical custody of the minor children (R. 369). In paragraph 8 of the Amended Decree, it states that Petitioner requested a reduction in both child support and alimony (R. 362). However, the court reserved the issue of a reduction for six months in order to allow each party to “obtain further information regarding the Petitioner’s actual income” (R. 362). Within a few months of Petitioner acknowledging that he earned about \$10,000 per month,

On November 2, 2004, Petitioner filed an Amended Findings of Fact and Conclusions of Law signed by the trial judge (R. 347-58). In paragraph 10, it states that Petitioner has requested a reduction in both child support and alimony, “which [child support] has previously been ordered in the amount of \$2,100.00 per month and alimony which has been ordered in the amount of \$4,000.00 per month” (R. 350). “The issue of whether or not a reduction should be granted shall be reserved for a period of six months so that each party is able to obtain further information regarding the Petitioner’s actual income” (R. 350).

In order to resolve the remaining issues, Respondent filed discovery requests on Petitioner on November 4, 2005 (R. 373).

Despite the fact that Petitioner requested a reduction in alimony and child support, his attorney withdrew on May 25, 2005 (R. 376). A notice to appear or appoint counsel or appear in person was filed on June 13, 2005 (R. 378).

Almost two years after the Decree was entered, Respondent filed a Counter-Affidavit on August 25, 2006, requesting that Judgment be granted on Petitioner’s arrearages for past child support and alimony (R. 556-67). In response, Petitioner filed

an Objection to Hearing and Motion to Strike Request for Judgment (R. 600-05).

Petitioner asserted that the August 11, 2006 Temporary Order merged in the Decree, claiming that the temporary orders regarding child support and alimony “ceased to exist once the permanent order [Decree] was issued” (R. 603). Petitioner further asserted that because no new order regarding alimony or child support existed, then any judgment on alimony or child support since the Decree would be inappropriate (R. 600-03).

At the hearing before Commissioner Patton on September 18, 2006, the minute entry provides that the court found that Respondent was entitled to all arrearages based on child support and alimony (R. 611-12).<sup>1</sup> Petitioner was given two weeks to provide proof of payment (R. 611).

The oral ruling was reduced to a written order and filed on October 25, 2006 (R. 657-661). The court found that the prior August 10, 2004 Order awarding Respondent child support and alimony was not modified (R. 660). The court observed that Petitioner requested a reduction in the child support and alimony obligations at the September 27, 2004 hearing, and that his request was reserved for six months (R. 660). The court found that the burden to move forward on Petitioner’s request for reduction was his and not Respondent’s (R. 660). The court further found that Petitioner recognized his support obligation during the six month period “by making periodic payments, but failed to take any action to have his request for reduction considered by the court” (R. 659-60). Accordingly, the court granted a judgment against Petitioner in the amount of

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<sup>1</sup> Despite Petitioner’s assertion otherwise (Aplt. Br. at 12), the minute entry does not state that Respondent was entitled to arrearages based on the August 11, 2004 temporary order. It states that she “is entitled to a Judgment for the arrearages” (R. 611-12).

\$108,116.00 for child support and alimony arrearages through September 2006 and gave Petitioner two additional weeks to show proof of payment for which he had not received credit (R. 559-60).

Petitioner filed an objection to the recommendation of the Commissioner on September 20, 2006 (R. 637-44).

The trial court heard oral arguments on Petitioner's Objection on January 2, 2007 (R. 686; 811). The court entered a written Ruling on Petitioner's Objection to the Commissioner's Recommendation on January 10, 2007 (R. 686-92).

The Findings of Fact, Conclusions of Law and Judgment were entered on March 27, 2007 (R. 799-804). The court agreed with the Commissioner's findings and legal conclusions, finding that the Decree implicitly adopts the temporary support orders, wherein Petitioner was ordered to pay child support in the amount of \$700 per month per child and alimony in the amount of \$4,000 per month (R. 799-801). The court, however, modified the Judgment by reducing the amount for the approximate month and a half that the children were in Petitioner's custody (R. 801). The court entered a Judgment in the amount of \$107,066.00 against Petitioner (R. 801).

### **SUMMARY OF ARGUMENT**

The issue before this Court is whether the trial court correctly interpreted the Amended Decree of Divorce and the Amended Findings of fact and Conclusions of Law in finding that the Amended Decree adopted the Temporary Order wherein Petitioner agreed that he was responsible for child support payments in the amount of \$2,100 per month and alimony in the amount of \$4,000 per month.

The Petitioner asserts for the first time on appeal that the trial court erroneously failed to make specific factual findings pursuant to Utah Code Ann. §§ 78-45-7 and 30-3-5 in signing and entering the Amended Decree and Amended Findings.

However, Petitioner ignores the fact that both the Temporary Order , Amended Decree, and Amended Findings were reached pursuant to the stipulation of the parties and that Petitioner expressly agreed to these support payments. Moreover, Petitioner is unable to properly assert this claim on appeal because it is raised here for the first time; and, if the trial court committed any error by not making specific factual findings regarding support payments, Petitioner invited the trial court to commit such alleged error.

Respondent asserts that Petitioner's interpretation of the Amended Decree and Amended Findings wherein Petitioner alleges that the stipulation allowed Petitioner to challenge the Temporary Order is disingenuous. Petitioner never filed a petition to modify the Temporary Order and first requested a reduction of his support payments at the hearing where the parties stipulated to the Amended Decree. Petitioner's interpretation of the Amended Decree is in direct opposition to relevant case law and statutory law that provide that support obligations cannot be retroactively granted. Accordingly, Petitioner's appeal lacks merit and Respondent respectfully requests that it be denied.

## ARGUMENT

### **I. THE AMENDED DECREE ADOPTS THE PRIOR ORDER THAT PETITIONER'S CHILD SUPPORT OBLIGATION IS \$2,100 PER MONTH AND PETITIONER'S ALIMONY OBLIGATION IS \$4,000 PER MONTH**

The Amended Decree and Amended Findings clearly set forth that Petitioner's child support and alimony obligations are based on the amounts set forth in the previous August 11, 2004 order (R. 350; 362). For the first time on appeal, Petitioner asserts that the trial court failed to make sufficient factual findings regarding the child support and alimony awards. Respondent asserts that Petitioner mistakes the true issue before this court and that his argument that the record is devoid of factual findings is a red herring.

#### **A. The Child Support and Alimony obligations set forth in the Amended Decree and Amended Findings are the result of a stipulation between the parties and do not require factual findings.**

For the first time on appeal, Petitioner asserts that because the Amended Decree and Amended Findings do not contain any "relevant findings on the issues related to the award of child support or alimony," the trial court's Judgment against Petitioner for arrearages in the amount of \$107,066.00 must be reversed (Aplt. Br. at 19-20). To support this position, Petitioner relies upon Utah Code Ann. §§ 78-45-7(2), (3), and (4) and also § 30-3-5(8),<sup>2</sup> in an attempt to establish that trial courts must always assess the financial needs and conditions of the parties when ordering child support and alimony (Aplt. Br. at 20-23). However, the procedural history of this case establishes that Petitioner's arguments are without merit.

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<sup>2</sup> Utah Code Ann. §§ 78-45-7 and 30-3-5 are attached in the Addenda.

In this case, the parties entered a stipulation on the record regarding temporary child support and alimony obligations (R. 55-57). Petitioner acknowledged that he earned approximately \$10,000 per month and he acknowledged that Respondent was unemployed (R. 55-57). Based on the disparate earnings between the parties, Petitioner agreed to pay child support in the amount of \$2,100 per month and alimony in the amount of \$4,000 per month (R. 56).

Just two months after this stipulation was entered as an order, the Petitioner drafted and filed the Decree of Divorce and Findings of Fact and Conclusions of Law on October 7, 2004 (R. 314-26; 328-39). Amended filings were drafted by Petitioner and filed on November 2, 2004 (R. 347-58; 359-70).<sup>3</sup>

The Amended Decree and Amended Findings were reached pursuant to a stipulation on the record (R. 358; 370). Paragraph 8 of the Amended Decree and paragraph 10 of the Amended Findings provide:

The Petitioner has requested a reduction in both child support, which has previously been ordered in the amount of \$2,100.00 per month, and alimony which has been ordered in the amount of \$4,000.00 per month. The issue of whether or not a reduction should be granted shall be reserved for a period of six months so that each party is able to obtain further information regarding the Petitioner's actual income.

(R. 350; 362).

From these two paragraphs, it is clear that Petitioner requested a “reduction” in the amount of child support and alimony that he had previously been ordered to pay (R. 56;

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<sup>3</sup> Regarding the issue of child support and alimony, there are no significant differences between the Amended Decree and Amended Factual Findings compared to the original Decree and original Factual Findings (R. 314-26; 328-39; 347-58; 359-70).



350; 362). It is also clear that Petitioner was granted “six months” to provide “further information regarding [his] actual income” in order to justify a reduction in child support and alimony (R. 350).

Six months passed and Petitioner made no attempt to provide the court or Respondent with proof of his actual income (R. 556-67). In fact, Petitioner’s attorney withdrew on May 25, 2005 without ever filing a motion to modify the amended decree for child support and alimony (R. 376).

When Respondent obtained a Judgment against Petitioner for child support and alimony arrearages, Petitioner filed his Objection with the trial court, alleging that the temporary order merged with the Decree and that he was not responsible for child support or alimony since the time that the Decree was entered (R. 637-44).

The trial court rejected Petitioner’s assertion the temporary orders merged with the Amended Decree (R. 801). The trial court found that the Amended Decree “implicitly adopts the Temporary Order” (R. 800). After quoting the Decree, the trial court found “In order for an award to be reduced the award must have existed in the first place. This paragraph implicitly acknowledges that Petitioner is seeking a reduction of the Temporary Order. The \$700 per-child and \$4,000 in alimony are the only amounts that had ever been entered and are logically the amounts referred to in the Decree” (R. 800). The trial court further found that “Petitioner had six months to provide accurate information regarding his income and thereby adjust the [a]wards entered in the Temporary Order. Petitioner failed to take any action during this time when the possibility of modification existed” (R. 800).

Now, for the first time on appeal, Petitioner alleges that the trial court erred in entering Judgment against Respondent because the Amended Decree and Amended Findings do not contain sufficient factual findings relating to child support and alimony awards (Aplt. Br. at 19-25).

**1. The trial court was not required to consider the factors in Utah Code Ann. § 78-45-7(3) because a prior order existed by stipulation of the parties.**

For the first time on appeal, Petitioner asserts that the trial court erred by failing to make specific factual findings in the Amended Findings supporting the child support award of \$2,100 per month (Aplt. Br. at 20). However, Petitioner fails to look at the plain language of § 78-45-7(2), (3) and (4) and he fails to consider § 78-45-7(1). In addition, Petitioner fails to consider the fact that parties can stipulate to child support.

Utah Code Ann. § 78-45-7(1)(a) provides:

Prospective support shall be equal to the amount granted by prior court order unless there has been a substantial change of circumstances on the part of the obligor or obligee or adjustment under Subsection 78-45-7.2(6) has been made.

U.C.A. § 78-45-7(1)(a). There is no need to look to Utah Code Ann. §§ 78-45-7(2) and (4) because these subsections apply only where there is “no prior court order....” U.C.A. §§ 78-45-7(2), (4).

In this case, it is undisputed that a prior order was in place (R. 55-57; 98-101). Petitioner admits that a prior order was in place and that it was a stipulated order (Aplt. Br. at 20, 25). Moreover, in the prior order, dated August 11, 2004, Petitioner agreed that he earned \$10,000 per month and that Respondent was unemployed (R. 55-57; 98-101).

Therefore, § 78-45-7(1) is controlling and Petitioner's assertion that §§ 78-45-7(2), (3), and (4) are controlling is without merit.

Furthermore, under the plain language of § 78-45-7, there was no need to make specific findings relating to the parties' financial condition because of the stipulated prior order. Utah Code Ann. § 78-45-7(3) applies only where "the court finds sufficient evidence to rebut the [child support] guidelines...." Because the parties' stipulated to the amount of child support, there was no need for the trial to look to the parties' underlying financial condition.

In addition, the case law Petitioner cites to that allegedly shows that the trial court is required in all instances to consider the financial circumstances of the parties before entering a child support award are inapposite. None of these cases dealt with the issue before this court, where the parties stipulated to the prior court order and stipulated to the Amended Decree.

Accordingly, Petitioner's assertion that the trial court erred by failing to consider the parties' specific financial circumstances is without merit. The trial court was not required to look at the parties' standard of living, the wealth of the parties, etc., when adopting the prior Temporary Orders because the prior Temporary Order was reached by stipulation of the parties and it equaled the amount of the prior court order (R. 55-57; Aplt. Br. at 25).

At the hearing where the parties stipulated to the Decree, it appears that Petitioner alleged a change in circumstances that would allow the court to depart from the prior Temporary Orders (R. 362; 369). While Utah Code Ann. § 78-45-9(1)(a) allows the

court to depart from the prior support order for a “substantial change in circumstances,” it appears that the court was unwilling to do so because Petitioner was unable to establish any change in circumstances (R. 362).<sup>4</sup> The court did allow, however, the Petitioner six months in order to obtain “information regarding [his] actual income” to see “whether or not a reduction should be granted” (R. 362).

Furthermore, parties are allowed to stipulate to child support as long as the court approves the stipulation and order does intrude on a parent’s obligation to support their children. *See e.g. Hills v. Hills*, 638 P.2d 516, 517 (Utah 1981) (stipulation on child support cannot be bartered away, extinguished, estopped or defeated by conduct of the parents).

Thus, any argument that the trial court failed to consider the parties’ underlying financial circumstances before entering a child support award is a red herring. The real and only issue before this Court is whether the trial court erred in finding that the stipulated Amended Decree adopted the Temporary Order making Petitioner liable for \$107,066.00 in past child support and alimony obligations.

- 2. The trial court was not required to consider the factors in Utah Code Ann. § 30-3-5(8) because the parties stipulated to Temporary Orders and the Amended Decree.**

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<sup>4</sup> The Amended Decree provides that the parties reached this stipulation at a hearing on September 27, 2004 (R. 370). However, despite Rule 11(e) of the Utah Rules of Appellate Procedure, Petitioner failed to provide this transcript as part of the record on appeal.

Petitioner asserts for the first time on appeal that Utah Code Ann. § 30-3-5(8) demands that trial courts must consider all the relevant factors listed in subsection 8 when awarding alimony (Aplt. Br. at 22-23). Petitioner assertion is without merit.

As shown above, the trial court found that the Decree adopted the Temporary Orders providing that Petitioner was responsible for alimony in the amount of \$4,000 per month (R. 362; 799-801). The Temporary Orders was a result of the stipulation of the parties (R. 55-57; 98-101). The Decree was entered by stipulation of the parties (R. 370). The trial court found that the Decree allowed Petitioner a period of six months with which to contest the alimony amount (R. 799-801). The trial court further found that the burden to change the alimony amount in the Decree was the Petitioner's and that "Petitioner failed to take any action during this time" to seek a reduction (R. 800).

It is a well-accepted fact that trial courts have authority to accept stipulations of the parties regarding alimony. *See e.g., Balls v. Hakcley*, 745 P.2d 836, 838 (Utah App. 1987). Petitioner stipulated to paying alimony in the amount of \$4,000 per month, with the agreement of Respondent that Petitioner had six months to seek a reduction in the alimony amount (R. 363; 799-801). Despite this agreement with Respondent that allowed Petitioner an additional six months to show whether alimony should be different, Petitioner took no action (R. 800).

Respondent asserts that if any error occurred, it was Petitioner's own error for failing to follow through with the clear language of the Decree. It is disingenuous for Petitioner to claim now for the first time on appeal that the trial court erred by failing to conduct specific factual findings regarding the parties' financial circumstances, fault, and

other elements of Utah Code Ann. § 30-3-5(8). In essence, Petitioner is asserting that the trial court's real error was failing to prevent Petitioner from entering into this stipulated divorce decree. Such an assertion is ludicrous.

**3. Petitioner cannot raise new arguments on appeal for the first time and if any error occurred, Petitioner invited the alleged error.**

Petitioner objected to the Commissioner's recommendation that Judgment be granted in favor of Respondent for delinquent child support and alimony obligation pursuant to the Amended Decree (R. 637-44). Nowhere below, however, did Petitioner raise the argument that the trial court erroneously failed to enter specific factual findings when determining child support and alimony (R. 637-644; 798-801; 810; 811). Petitioner has not asserted that the trial court committed plain error. Respondent asserts that Petitioner should be barred from raising this issue for the first time on appeal. Moreover, this issue should not be addressed because if the trial court committed any error, Petitioner invited the alleged error.

"It is a well established rule that a defendant who fails to bring an issue before the trial court is generally barred from raising it for the first time on appeal." *Moore v. Smith*, 2007 UT App 101, ¶24, 158 P.3d 562 (quotation omitted). Moreover, this Court "will not address the merits of [a] claim, even under plain error," where the appellant "invited the alleged error of which they now complain." *Id.* at ¶30.

Respondent asserts that Petitioner invited any alleged error because Petitioner stipulated to the Amended Decree and stipulated to the Amended Findings (R. 358; 370). Although Petitioner failed to provide the transcript of the hearing where the parties

entered their stipulation on the record regarding the Decree, the Commissioner found that while Petitioner requested a reduction in the alimony and child support amounts, Petitioner did not want to hold up the entry of the divorce decree and was willing to wait up to six months before the trial court could make factual findings relating to the financial circumstances of the parties (R. 810: 14-15).

If Petitioner had requested the hearing within the six month time period, then the trial court would have held the hearing and appropriate findings would have been made pursuant to statute (R. 810: 15-16). Factual findings were not necessary, however, because the parties stipulated on the record as to the amounts of child support and alimony (R. 55-57; 98-101; 370).

Therefore, if the trial court committed error by failing to consider the financial circumstances and other factors under Utah Code Ann. §§ 30-3-5(8) and 78-45-7(3), any such error was committed at the urging of Petitioner to enter the Decree and wait six months to provide the necessary information to make such requisite findings. Petitioner cannot now complain on appeal that the trial court's failure to make specific factual findings regarding alimony and child support was in error when the Petitioner himself stipulated to these amounts and requested that the entry of decree not be held up. Accordingly, Petitioner invited the alleged error and cannot now complain on appeal of this alleged error.

**B. The Stipulated Amended Decree and Stipulated Amended Findings do not deprive the trial court authority to modify the Amended Decree.**

Petitioner asserts that if the Amended Decree and Amended Findings adopted the temporary orders, then this stipulation would deprive the trial court of its jurisdiction and statutory obligation (Aplt. Br. at 26-27). This assertion lacks merit.

Under *Sill v. Sill*, 2007 UT App 173, 164 P.3d 173, it is clear that trial courts have continuing jurisdiction to modify alimony and child support based on substantial changes in the circumstances not foreseeable at the time of divorce. *Id.* at ¶ 9.

Respondent has never asserted that Petitioner is unable to file a petition to modify the Amended Decree based on a foreseeable, substantial change in circumstances. In fact, Petitioner has already filed such a motion. The trial court has jurisdiction to consider the motion even though the Amended Decree and Amended Findings were based on stipulation of the parties. Petitioner's assertion otherwise lacks merit.

**II. THE TRIAL COURT CORRECTLY HELD THAT THE TEMPORARY ORDER WAS ADOPTED BY THE AMENDED DECREE**

Petitioner asserts that the language of paragraph 10 of the Amended Findings and the language of paragraph 8 of the Amended Decree are unambiguous, but that the trial court erroneously interpreted these paragraphs (Aplt. Br. at 30-31). Respondent agrees that the stipulation between the parties formally entered in the Amended Decree and Amended Findings is unambiguous. However, Respondent asserts that Petitioner's



assertion that the stipulated Amended Decree and Amended Findings did not adopt the temporary orders as the basis for child support and alimony lacks merit.<sup>5</sup>

Trial courts are given broad discretion in divorce matters “so long as the decision is within the confines of legal precedence.” *Whitehead v. Whitehead*, 836 P.2d 814, 816 (Utah App. 1992 ). A trial court’s legal conclusions are reviewed for correctness. *See Id.* “Language in a written document is ambiguous if the words used may be understood to support two or more plausible meanings.” *Whitehouse v. Whitehouse*, 790 P.2d 57, 60 (Utah App. 1990). “However, the mere fact that the parties interpret the language differently does not, per se, render the writing ambiguous.” *Id.*

Petitioner first asserts that the intention of the parties for providing six months for Petitioner to provide evidence in support of his claim to possibly reduce child support and alimony was “related only to his right to challenge the terms of the temporary order that terminated with the entry of the Decree on October 7, 2004” (Aplt. Br. at 32).

Petitioner next asserts that the final determination of child support and alimony was reserved by paragraphs 10 and 16 and that the Amended Decree did not set forth any amount for child support or alimony (Aplt. Br. at 32).

To support these assertions, Petitioner recites case law regarding contract interpretation (Aplt Br. at 33-34). Petitioner makes no meaningful effort to show why his interpretation is correct, other than to recite paragraphs 8, 9, 10, and 16, and argue that, although he could not afford to pay an attorney during the six month window, he never waived his right to contest the temporary orders since June 2004 (Aplt. Br. at 31, 33).

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<sup>5</sup> The trial court found that Petitioner’s assertion was “disingenuous” (R. 800).

Petitioner next leaves contract interpretation and asserts that if Respondent truly believed that the Amended Decree adopted the temporary orders, “there would have been no reason to conduct discovery related to the income and expenses of the parties” (Aplt. Br. at 35). Petitioner then recites efforts made on Respondent’s behalf to determine Petitioner’s true income and his own failure to comply with these demands (Aplt. Br. at 35).

There is no reason for Petitioner misunderstand Respondent’s attempts to learn his true income. Respondent propounded discovery in order to learn Petitioner’s true earnings in order to ensure Petitioner is making adequate support payments and to ensure that he is not hiding assets. Respondent has every right to do this considering that property settlement issues were reserved (R. 348-49; 360-61). Moreover, the record shows that Petitioner agreed that he earned at least \$10,000 per month (R. 55-57). Petitioner filed a draft of his single filer tax return for the year 2003 showing an income of \$10,000 per month (R. 312). Inexplicably, or rather carelessly, Petitioner later filed a joint tax return showing an income of approximately \$49,000 for the tax year 2003 (R. 734). Respondent lived with Petitioner for many years and Respondent is curious as to what happened to Petitioner’s income.

Petitioner further argues that the temporary order merged with the Amended Decree as a matter of law (Aplt. Br. at 36). However, Petitioner’s reliance on *Searle v. Searle*, 2001 UT App 367, 38 P.3d 307, is misplaced. Petitioner merely recites (incorrectly) one sentence in *Searle*: “When a temporary order is followed by a

permanent order, the temporary order merges into the permanent order” (Aplt Br. at 36, quoting *Searle*, 2001 UT App 367 at ¶ 15).

Bootstrapping one sentence in *Searle* to the facts of this case does not show that the trial court’s ruling was erroneous. The facts in *Searle* are not similar to the facts in this case and the merger language in *Searle* is not relevant to the language of the Amended Decree. In this case, the Amended Decree did not merely replace the Temporary Orders as the permanent order replaced the temporary order in *Searle*. In fact, the Amended Decree implicitly adopted the Temporary Orders (R. 799-802).

Respondent asserts that the trial court’s Conclusions of Law and Judgment correctly found that the express language of the Amended Decree implicitly acknowledged that the child support and alimony amounts previously entered in the Temporary Orders was adopted by the Amended Decree (R. 800). Otherwise, the language of “whether or not a reduction should be granted” would be superfluous and would have made the entire paragraph meaningless. The unambiguous language of the Amended Decree provides that alimony and child support has been set, and Petitioner had six months to provide information to see “whether or not a reduction should be granted” (R. 362). Petitioner failed to do anything within the six months so the child support and alimony payments in the Amended Decree stand (R. 800).

Petitioner also asserts that he had insufficient information regarding his finances to file his child support worksheet and that prevented him from filing the requisite child support worksheets back in 2004 (Aplt. Br. at 31). Petitioner’s assertions lack merit. There is no reason to believe that Petitioner was unable to learn how much income he

earned and what his monthly expenses were. The fact that he repeatedly failed to provide these to Respondent is no excuse for asserting that he could not produce this information when the stipulated Amended Decree was entered (Aplt. Br. at 31).

Moreover, Petitioner's claim that the Amended Decree preserved his right to challenge the child support and alimony award set forth in the stipulated August 11, 2004 order is not plausible (Aplt. Br. at 32). In *Whitehead v. Whitehead*, the father asserted that he was not responsible for overdue support payments. *Whitehead*, 836 P.2d at 815. This Court refuted that assertion, stating, "Child and spousal payments become unalterable debts as they accrue, and courts may not retroactively reduce or excuse past-due support obligations." *Id.* at 816.

Petitioner's assertion that the Amended Decree allowed him to revisit his past due support payments completely lacks merit. The Petitioner stipulated to the temporary support payments and never filed a petition to modify the August 11, 2004 Temporary Order (R. 98-101). If Petitioner had filed a motion seeking to modify his support obligations, then his support obligations may have been modifiable from the date the petition was filed. *See* U.C.A. § 78-45-9.3(3)(c), (4) (Addenda). However, no such motion was made and it is disingenuous to assert that a correct interpretation of the Amended Decree and Amended Findings allowed him to challenge the terms of the August 11, 2004 order.

In conclusion, Petitioner has failed to show that the trial court committed any error in finding that the Amended Decree and Amended Findings adopted the child support

and alimony awards in the Temporary Orders. Accordingly, Petitioner's appeal should be denied.

### **III. PETITIONER'S PLEAS TO EQUITY LACK MERIT**

Respondent asserts that Petitioner's pleas for equity lack merit and misconstrue the record. Petitioner is unable to provide any case law suggesting that equity dictates overruling the trial court's interpretation of the Amended Decree because child support and alimony determinations are generally guided by equitable principles.

Petitioner fails to realize that he agreed that his income was \$10,000 per month and that Respondent was unemployed (R. 55-57). Petitioner further fails to realize the fact that he agreed provide alimony in the amount of \$4,000 per month and child support in the amount of \$700 per month per child (R. 55-77). Nothing prohibited Petitioner from filing a petition to modify the Temporary Orders due to a change in circumstances.

Instead, Petitioner now asserts almost four years after the fact that he was not earning that much money in 2004 and he should be allowed to reach back and change his own admissions and modify the support he owed his family (Aplt. Br. at 37-8). Petitioner had every opportunity to attempt to modify the Temporary Orders before he stipulated to the Amended Decree and he now has every opportunity to attempt to modify the Amended Decree.

Petitioner further misconstrues the record by asserting that his monthly income is insufficient to maintain his support obligations. Petitioner admits that he has not cooperated in discovery (Aplt. Br. at 35). Petitioner's pleas for equity are not well taken considering the fact that he asserts that he did not know his own income at the time of

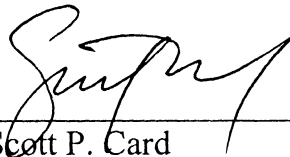
divorce and concedes that he did not comply with discovery (Aplt. Br. at 31, 35).

Accordingly, Petitioner's argument for equity should not be considered.

### **CONCLUSION AND PRECISE RELIEF SOUGHT**

For the foregoing reasons, Brenda Wilson asks this Court to affirm the trial court's FINDINGS OF FACT, CONCLUSIONS OF LAW and JUDGMENT, dismiss Petitioner's appeal, and award her costs and attorney's fees for having to respond to this appeal.

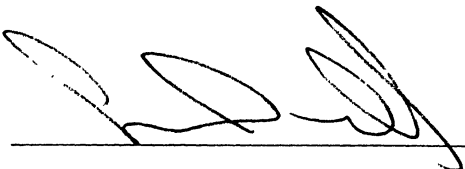
RESPECTFULLY SUBMITTED this 26 day of March, 2008.

  
\_\_\_\_\_  
Scott P. Card  
Counsel for Respondent/Appellee

### **CERTIFICATE OF MAILING**

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Respondent to the following this 26 day of March, 2008:

Rose Blakelock  
75 South 300 West  
Provo, Utah 84601

  
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## **ADDENDA**

### **30-3-5**

#### **Statutes and Session Law**

##### **Title 30 - Husband and Wife**

##### **Chapter 03 - Divorce**

**30-3-5 Disposition of property -- Maintenance and health care of parties and children -- Division of debts -- Court to have continuing jurisdiction -- Custody and parent-time -- Determination of alimony -- Nonmeritorious petition for modification.**

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**30-3-5. Disposition of property -- Maintenance and health care of parties and children -- Division of debts -- Court to have continuing jurisdiction -- Custody and parent-time -- Determination of alimony -- Nonmeritorious petition for modification.**

(1) When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties. The court shall include the following in every decree of divorce:

(a) an order assigning responsibility for the payment of reasonable and necessary medical and dental expenses of the dependent children;

(b) if coverage is or becomes available at a reasonable cost, an order requiring the purchase and maintenance of appropriate health, hospital, and dental care insurance for the dependent children;

(c) pursuant to Section **15-4-6.5**:

(i) an order specifying which party is responsible for the payment of joint debts, obligations, or liabilities of the parties contracted or incurred during marriage;

(ii) an order requiring the parties to notify respective creditors or obligees, regarding the court's division of debts, obligations, or liabilities and regarding the parties' separate, current addresses; and

(iii) provisions for the enforcement of these orders; and

(d) provisions for income withholding in accordance with Title 62A, Chapter 11, Recovery Services.

(2) The court may include, in an order determining child support, an order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependent children, necessitated by the employment or training of the custodial parent. If the court determines that the circumstances are appropriate and that the dependent children would be adequately cared for, it may include an order allowing the noncustodial parent to provide child care for the dependent children, necessitated by the employment or training of the custodial parent.

(3) The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

(4) Child support, custody, visitation, and other matters related to children born to the mother and father after entry of the decree of divorce may be added to the decree by modification.

(5) (a) In determining parent-time rights of parents and visitation rights of grandparents and other members of the immediate family, the court shall consider the best interest of the child.



(b) Upon a specific finding by the court of the need for peace officer enforcement, the court may include in an order establishing a parent-time or visitation schedule a provision, among other things, authorizing any peace officer to enforce a court-ordered parent-time or visitation schedule entered under this chapter.

(6) If a petition for modification of child custody or parent-time provisions of a court order is made and denied, the court shall order the petitioner to pay the reasonable attorneys' fees expended by the prevailing party in that action, if the court determines that the petition was without merit and not asserted or defended against in good faith.

(7) If a petition alleges noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

(8) (a) The court shall consider at least the following factors in determining alimony:

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

(b) The court may consider the fault of the parties in determining alimony.

(c) As a general rule, the court should look to the standard of living, existing at the time of separation, in determining alimony in accordance with Subsection (8)(a). However, the court shall consider all relevant facts and equitable principles and may, in its discretion, base alimony on the standard of living that existed at the time of trial. In marriages of short duration, when no children have been conceived or born during the marriage, the court may consider the standard of living that existed at the time of the marriage.

(d) The court may, under appropriate circumstances, attempt to equalize the parties' respective standards of living.

(e) When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change shall be considered in dividing the marital property and in determining the amount of alimony. If one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, the court may make a

compensating adjustment in dividing the marital property and awarding alimony.

(f) In determining alimony when a marriage of short duration dissolves, and no children have been conceived or born during the marriage, the court may consider restoring each party to the condition which existed at the time of the marriage.

(g) (i) The court has continuing jurisdiction to make substantive changes and new orders regarding alimony based on a substantial material change in circumstances not foreseeable at the time of the divorce.

(ii) The court may not modify alimony or issue a new order for alimony to address needs of the recipient that did not exist at the time the decree was entered, unless the court finds extenuating circumstances that justify that action.

(iii) In determining alimony, the income of any subsequent spouse of the payor may not be considered, except as provided in this Subsection (8).

(A) The court may consider the subsequent spouse's financial ability to share living expenses.

(B) The court may consider the income of a subsequent spouse if the court finds that the payor's improper conduct justifies that consideration.

(h) Alimony may not be ordered for a duration longer than the number of years that the marriage existed unless, at any time prior to termination of alimony, the court finds extenuating circumstances that justify the payment of alimony for a longer period of time.

(9) Unless a decree of divorce specifically provides otherwise, any order of the court that a party pay alimony to a former spouse automatically terminates upon the remarriage or death of that former spouse. However, if the remarriage is annulled and found to be void ab initio, payment of alimony shall resume if the party paying alimony is made a party to the action of annulment and his rights are determined.

(10) Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.

Amended by Chapter 129, 2005 General Session

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## **78-45-7**

### **Statutes and Session Law**

#### **Title 78 - Judicial Code**

#### **Chapter 45 - Uniform Civil Liability for Support Act**

#### **78-45-7 Determination of amount of support -- Rebuttable guidelines.**

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#### **78-45-7. Determination of amount of support -- Rebuttable guidelines.**

(1) (a) Prospective support shall be equal to the amount granted by prior court order unless there has been a substantial change of circumstance on the part of the obligor or obligee or adjustment under Subsection **78-45-7.2(6)** has been made.

(b) If the prior court order contains a stipulated provision for the automatic adjustment for prospective support, the prospective support shall be the amount as stated in the order, without a showing of a material change of circumstances, if the stipulated provision:

(i) is clear and unambiguous;

(ii) is self-executing;

(iii) provides for support which equals or exceeds the base child support award required by the guidelines; and

(iv) does not allow a decrease in support as a result of the obligor's voluntary reduction of income.

(2) If no prior court order exists, a substantial change in circumstances has occurred, or a petition to modify an order under Subsection **78-45-7.2(6)** has been filed, the court determining the amount of prospective support shall require each party to file a proposed award of child support using the guidelines before an order awarding child support or modifying an existing award may be granted.

(3) If the court finds sufficient evidence to rebut the guidelines, the court shall establish support after considering all relevant factors, including but not limited to:

(a) the standard of living and situation of the parties;

(b) the relative wealth and income of the parties;

(c) the ability of the obligor to earn;

(d) the ability of the obligee to earn;

(e) the ability of an incapacitated adult child to earn, or other benefits received by the adult child or on the adult child's behalf including Supplemental Security Income;

(f) the needs of the obligee, the obligor, and the child;

(g) the ages of the parties; and

(h) the responsibilities of the obligor and the obligee for the support of others.

(4) When no prior court order exists, the court shall determine and assess all arrearages based upon the Uniform Child Support Guidelines described in this chapter.

Amended by Chapter 53, 1998 General Session

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### **78-45-9.3**

#### **Statutes and Session Law**

##### **Title 78 - Judicial Code**

##### **Chapter 45 - Uniform Civil Liability for Support Act**

##### **78-45-9.3 Payment under child support order -- Judgment.**

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#### **78-45-9.3. Payment under child support order -- Judgment.**

(1) All monthly payments of child support shall be due on the 1st day of each month for purposes of child support services pursuant to Title 62A, Chapter 11, Part 3, income withholding services pursuant to Part 4, and income withholding procedures pursuant to Part 5.

(2) For purposes of child support services and income withholding pursuant to Title 62A, Chapter 11, Part 3 and Part 4, child support is not considered past due until the 1st day of the following month. For purposes other than those specified in Subsection (1) support shall be payable 1/2 by the 5th day of each month and 1/2 by the 20th day of that month, unless the order or decree provides for a different time for payment.

(3) Each payment or installment of child or spousal support under any child support order, as defined by Section **78-45-2**, is, on and after the date it is due:

(a) a judgment with the same attributes and effect of any judgment of a district court, except as provided in Subsection (4);

(b) entitled, as a judgment, to full faith and credit in this and in any other jurisdiction; and

(c) not subject to retroactive modification by this or any other jurisdiction, except as provided in Subsection (4).

(4) A child or spousal support payment under a child support order may be modified with respect to any period during which a modification is pending, but only from the date of service of the pleading on the obligee, if the obligor is the petitioner, or on the obligor, if the obligee is the petitioner. If the tribunal orders that the support should be modified, the effective date of the modification shall be the month following service on the parent whose support is affected. Once the tribunal determines that a modification is appropriate, the tribunal shall order a judgment to be entered for any difference in the original order and the modified amount for the period from the service of the pleading until the final order of modification is entered.

(5) For purposes of this section, "jurisdiction" means a state or political subdivision, a territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico, Native American Tribe, or other comparable domestic or foreign jurisdiction.

(6) The judgment provided for in Subsection (3)(a), to be effective and enforceable as a lien against the real property interest of any third party relying on the public record, shall be docketed in the district court in accordance with Sections **78-22-1** and **62A-11-312.5**.

Amended by Chapter 176, 2003 General Session

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